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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

PHYLLIS J. KING,

Plaintiff,

v.

FEDERAL BUREAU OF
 INVESTIGATION,

Defendant.

C 08-1919 PJH

**SPECIAL APPEARANCE
 DEFENDANT'S NOTICE OF
 MOTION AND MOTION TO DISMISS
 [FED. R. CIV. P. 12(b)]**

Date: June 18, 2008
 Time: 9:00 a.m.
 Courtroom 3, 17th Floor

I. NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on Wednesday, June 18, 2008 at 9:00 a.m., or as soon thereafter as may be heard, the federal defendant, specially appearing through its attorney of record, will and hereby does move to dismiss the complaint for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1).^{1/} Specifically, plaintiff alleges that the Federal Bureau of Investigation ("FBI"), an agency of the United States, committed various torts. Under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* ("FTCA"), a plaintiff must file an administrative claim with the appropriate federal agency before suing the United States, which is the only proper defendant. See 28 U.S.C. § 2675, 2679(a). Plaintiff has not done so. Because plaintiff has failed to

^{1/} Plaintiff has not properly served defendant as required by Rules of Civil Procedure Rule 4(i)(1)(A)(i)(ii).

1 exhaust her administrative remedies under the FTCA, the court lacks subject matter jurisdiction and
 2 this case should be dismissed without prejudice.

3 This motion is based upon this Notice of Motion, the Declaration of Jennifer A. Wilson
 4 (“Wilson Decl.”) filed on April 16, 2008, all the papers and records currently on file in the above-
 5 captioned matter, and any additional evidence and argument that this court may permit.

6 This motion will be heard in Courtroom No. G, 15th Floor, at 450 Golden Gate Avenue in San
 7 Francisco, California.

8 **II. STATEMENT OF FACTS**

9 Plaintiff Phyllis King filed this action against the FBI on December 31, 2007 in San Francisco
 10 County Superior Court. In her complaint, plaintiff makes a variety of allegations related to having
 11 been laid off at the “Fine Arts Museum” of San Francisco. She also alleges that “for over a year [her]
 12 home was repeatedly visited by FBI agents, that garbage has been thrown in [her] back yard, a dead
 13 mouse has been placed in [her] home, unlawful entry, [her] phone reception is not good.” She also
 14 claims that since December 31, 2006 through December 31, 2007 her place has been like “Grand
 15 Central Station”. In the complaint, plaintiff seeks damages from the FBI in the amount of
 16 \$1,000,000.00 for property damage, intentional tort, and premises liability. The federal defendant
 17 removed the action to federal court.

18 Plaintiff has not filed an administrative claim with the FBI. Wilson Decl., ¶ 4. Further, the
 19 FBI has no record under plaintiff’s name of any law enforcement activities. *Id.*, ¶ 3.

20 **III. THE COURT LACKS SUBJECT MATTER JURISDICTION AND SHOULD DISMISS** 21 **THE CASE BECAUSE PLAINTIFF HAS NOT EXHAUSTED HER** **ADMINISTRATIVE REMEDIES UNDER THE FTCA.**

22 **A. The Legal Standard**

23 A motion to dismiss under FRCP 12(b)(1) tests the subject matter jurisdiction of the court.
 24 *See, e.g., Savage v. Glendale Union High School*, 343 F.3d 1036, 1039-40 (9th Cir. 2003), *cert.*
 25 *denied*, 541 U.S. 1009 (2004). A motion will be granted if the complaint, when considered in its
 26 entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction. *Id.* at 1039
 27 n.2.

1 The sovereign cannot be sued without its consent. *United States v. Sherwood*, 312 U.S. 584
 2 (1941); *Gould v. U.S. Dept. of Health & Human Services*, 905 F.2d 738, 741 (4th Cir. 1990).
 3 Moreover, the terms of that consent define a federal court's jurisdiction to entertain such suit. *United*
 4 *States v. Testan*, 424 U.S. 392 (1976).

5 The FTCA is the exclusive waiver of sovereign immunity for actions sounding in tort against
 6 the United States, its agencies and/or employees acting within the scope of their employment. *Smith*
 7 *v. United States*, 507 U.S. 197 (1993) *citing* 28 U.S.C. §1346(b). All limits and conditions within the
 8 FTCA are to be strictly construed in favor of the sovereign. *McNeil v. United States*, 508 U.S. 106
 9 (1983); *United States v. Orleans*, 425 U.S. 807 (1976); *Thigpen v. United States*, 800 F.2d 393 (4th
 10 Cir. 1986).

11 A prerequisite to filing suit under the FTCA involves the presentation of an administrative
 12 claim to the government within two years of the incident, *see* 28 U.S.C. § 2401 (b), and that the
 13 federal agency either finally denies the claim or fails “to make final disposition of a claim withing six
 14 months after it is filed. . .”. *See* 28 U.S.C. § 2675(a).^{2/}

15 **B. Plaintiff Has Not Complied with the Requirements of the FTCA.**

16 It is not clear why plaintiff believes FBI agents have visited her home or are responsible for
 17 any of the damage she alleges. Indeed, the FBI has no records regarding plaintiff. Regardless,
 18 plaintiff has not filed an administrative claim with the FBI regarding her allegations and that claim

20 Section 2675(a) states, in relevant part,

21 An action shall not be instituted upon a claim against the United States for money
 22 damages for injury or loss of property or personal injury or death caused by the
 23 negligent or wrongful act or omission of any employee of the Government while
 24 acting withing the scope of his office or employment, unless the claimant shall
 25 have first presented the claim to the appropriate Federal agency and his claim
 26 shall have been finally denied by the agency in writing and sent by certified or
 registered mail. The failure of an agency to make final disposition of a claim
 within six months after it is filed shall, at the option of the claimant any time
 thereafter, be deemed a final denial of the claim for purposes of this section. . . .

27 The federal defendant also notes that the United States, and not the federal agency, is the only
 28 proper defendant in a suit under the FTCA. *See* 28 U.S.C. § 2679(a)

1 has not been denied.

2 Because plaintiff has not complied with the jurisdictional prerequisites to suit under the
3 FTCA, the court lacks subject matter jurisdiction and the case should be dismissed. Because it
4 appears that the time period within which plaintiff may submit a claim with the agency has not yet
5 passed, the dismissal should be without prejudice.

6 **IV. CONCLUSION**

7 Plaintiff has failed to file an administrative claim with the federal agency, as required by the
8 FTCA. Accordingly, plaintiff's claim against the federal government should be dismissed without
9 prejudice for lack of subject matter jurisdiction.

10
11 Dated: April 29, 2008

Respectfully submitted,

JOSEPH P. RUSSONIELLO
United States Attorney

12
13 By: /s/
14 Joann M. Swanson
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of the following:

1. DEFENDANT'S RE- NOTICE OF MOTION AND MOTION TO DISMISS [FED. R. CIV. P. 12(b)]; and

2. [PROPOSED] ORDER GRANTING DEFENDANT'S MOTION TO DISMISS to be served this date upon the parties in this action by placing a true copy thereof in a sealed envelope, and served as follows:

☒ **FIRST CLASS MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

☐ **CERTIFIED MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

☐ **PERSONAL SERVICE (BY MESSENGER)**

☐ **FEDERAL EXPRESS via Priority Overnight**

☐ **EMAIL**

☐ **FACSIMILE (FAX)** Telephone No.: _____

to the party addressed as follows:

Phyllis J. King - In Pro Per
527 Vista Mar Avenue
Pacifica, California 94044

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 29th day of April 2007 at San Francisco, California.

/s/

Stefania M. Chin, Legal Assistant